Nos. 88-1872 and 88-2074

IN THE

Supreme Court of the United States

October Term, 1989

CYNTHIA RUTAN, et. al.,

Petitioners,

v.

REPUBLICAN PARTY OF ILLINOIS, et. al.,

Respondents,

and

MARK FRECH, et. al.,

Cross-Petitioners,

v.

CYNTHIA RUTAN, et. al.,

Cross-Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE OUT OF TIME, AND BRIEF AMICUS CURIAE OF THE NORTH CAROLINA PROFESSIONAL FIRE FIGHTERS ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OUT OF TIME

Pursuant to Rule 36 of the Rules of this Court, Amicus Curiae North Carolina Professional Fire Fighters Association (NCPFFA) respectfully moves this Court for leave to file out

of time the attached brief as amicus curiae in support of Petitioners. Each of the parties has consented to the filing of this amicus brief and correspondence confirming this consent has been forwarded to this Court.

NCPFFA is a statewide organization in existence for more than a decade consisting of thirteen local fire fighter associations throughout the State of North Carolina. NCPFFA has appeared as amicus in other federal constitutional litigation including litigation involving First Amendment rights of public employees. NCPFFA and its members are vitally interested in the important constitutional issues before this Court. The issues before this Court affect NCPFFA, the public interest, and the civil liberties of public employees throughout the nation.

To ensure that this Court is fully aware of the gravity of this case, NCPFFA has prepared the accompanying amicus brief. NCPFFA and its counsel only learned of this case on November 13, 1989, some seven days before petitioners' brief was due. The time necessary for obtaining requisite approval and preparation of the accompanying brief unfortunately prevented its timely filing. Consent to file this brief from all of the parties was not obtained until November 17, 1989.

WHEREFORE, NCPFFA respectfully moves this Court for leave to file out of time the attached brief as amicus curiae.

Respectfully submitted,

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BRIEF OF THE NORTH CAROLINA PROFESSIONAL FIRE FIGHTERS ASSOCIATION AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

NCPFFA's interest is set forth in the foregoing motion for leave to file this brief and herein amplified.

STATEMENT OF THE CASE

NCPFFA adopts the statement of the case as presented by Petitioners.

SUMMARY OF ARGUMENT

Respondents' political patronage scheme is unconstitutional because it severely punishes applicants and employees for the exercise of their true political beliefs and associations. Respondents' scheme seeks to promote partisan objectives through direct coercion in employment practices which subverts the essence of the First Amendment.

ARGUMENT

I. THE NATURE OF RESPONDENTS' PATRONAGE SCHEME AND THE APPLICATION OF STRICT SCRUTINY COMPEL THE CONCLUSION THAT RESPONDENTS' SCHEME IS UNCONSTITUTIONAL

The fundamental issue before this Court is whether the First Amendment prohibits a governmental employer from using a rigid partisan political litmus test when hiring, promoting, transferring or recalling employees from layoff. May government condition hiring, promotion, transfer or recall from layoff upon direct political support, even including

financial contribution to a particular political party or candidate?

The pervasive patronage scheme in issue here employs the most strict political test as the threshold standard for the entire spectrum of employment decisions. Respondents' patronage system thrives on the raw exercise of party politics. This abusive exercise of political power is thrust into the mainstream of day-to-day jobs. Respondents' patronage plan pervasively affects the essential means of subsistence for substantial numbers of citizens. The logical conclusion of the Seventh Circuit's decision below will inject unnecessary and harmful partisan politics into the general day-to-day affairs of basic American public administration.

Respondents' patronage practices are tantamount to the loyalty oaths struck down by this Court in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) and *Torcasco v. Watkins*, 367 U.S. 488 (1961). Respondents' patronage scheme is so explicit that it in effect requires a loyalty oath to the Republican Party in order to be hired, promoted, transferred or recalled from layoff. Respondents' employment policy is a relic of the past: to the victor goes the spoils. The occupational liberty interests of scores of citizens are trampled by Respondents' political pressure tactics.

In deciding these grave constitutional issues, this Court must employ its most strict and exacting scrutiny. In the precise context of patronage employment practices, this Court's seminal decision explained that "[i]t is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). In *Elrod*, this Court explained that such a First Amendment "encroachment 'cannot be justified upon a mere showing of a legitimate state interest.'" *Id.* quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). "The interest advanced lust be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Id.* This Court's recent cases have similarly held that governmental conduct must survive the most strict scrutiny where First Amendment

rights are at stake. *E.g., Eu v. San Francisco County Democratic National Commission*, 109 S.Ct. 1013, 1021 (1989) (compelling governmental interest is needed in order to burden free speech or association); *Hobie v. Unemployment Appeals Commission of Florida*, 107 S.Ct. 1046, 1049 (1987) (strict scrutiny applied; no compelling governmental interest established to override First Amendment protection). *Accord Shelton v. Tucker*, 364 U.S. 479, 485 (1960).

In *Elrod*, this Court enunciated the complete methodological analysis to be employed in assessing the constitutionality of patronage systems in employment. The government must utilize means closely drawn to avoid unnecessary abridgement of First Amendment rights. 427 U.S. at 362-63. It is not enough that that means chosen be rationally related. *Id.* at 362. If a less drastic means is available, the government may not choose a scheme that tramples First Amendment freedoms. *Id.* at 363. In essence, if a patronage employment system is to survive constitutional attack,

> it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights. 427 U.S. at 363.

Applying the foregoing analysis to the case *sub judice* mandates a finding that Respondents' pervasive patronage scheme is unconstitutional. Justice Brennan's plurality opinion in *Elrod* thoroughly addressed the various alleged interests served by patronage. Here, the Seventh Circuit failed to heed the methodological analysis set forth in *Elrod* and its progeny. Rather than employing the strict scrutiny mandated by *Elrod* and other decisions of this Court, the Seventh Circuit erroneously reasoned instead that "courts must afford the political process and political institutions great deference." 868 F.2d at 953. This case does not involve some mere deference;

it involves the most rigid form of partisan litmus test. The Seventh Circuit erroneously relied upon other considerations in support of patronage which this Court flatly rejected in both *Elrod* and *Branti v. Finkel*, 445 U.S. 507 (1980).

The fundamental interest served by Respondents' patronage scheme is the enhancement of political power and growth of the Republican Party. Patronage is a partisan rather than a governmental interest. Such partisan interests do not even constitute legitimate governmental interests much less the sort of "vital" government interest required to survive strict scrutiny. *Elrod*, 427 U.S. at 362-64. Patronage is not an appropriate means to implement a democratic mandate. *Id.* at 367-70. Nor does patronage further governmental efficiency, promote loyalty of employees or preserve the democratic process. *Id.* Rather, patronage "is inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment." *Id.* at 357. Patronage employment practices are fundamentally at odds with traditionally accepted employment criteria of merit, qualifications, performance, and other factors reasonably related to the enhancement of productivity and efficiency. In *Elrod*, this Court flatly rejected the proposition that patronage promotes efficient government. "At all events, less drastic means for insuring government effectiveness and employee efficiency are available for the state." 427 U.S. at 366.

The Seventh Circuit relied upon the alleged historic use of patronage as "a longstanding feature of American politics." 868 F.2d at 947, 953. Sadly enough, other similar forms of invidious discrimination in employment, housing, land use, and other areas were accepted for years before this Court brought the injustice to an end. *E.g., Brown v. Board of Education*, 347 U.S. 483 (1954). In *Elrod* and *Branti*, this Court recognized the unconstitutionality and ill effects of patronage employment practices. Respondents would have this Court return to the days where "to the victor goes the spoils." First Amendment rights are not bartering tools for nepotism by

politicos. The whim of politicians cannot be allowed to abrogate the essence of the First Amendment.

II. THE FIRST AMENDMENT AND THE DOCTRINES IN *ELROD* AND *BRANTI* APPLY TO PROHIBIT HIRING, PROMOTION, TRANSFER AND RECALL FROM LAYOFF DUE TO POLITICAL PATRONAGE, AFFILIATION OR BELIEFS

As Senator Sam Ervin explained in his authoritative treatise: "First Amendment freedoms are often grossly abused." Ervin, *Preserving The Constitution* 210 (1984). This case demonstrates gross abuse, calling into question the essence of the First Amendment in the context of a modern political spoils system. The *en banc* decision of the Seventh Circuit below, 868 F.2d 943, enunciated an unworkable standard misconstruing the scope of this Court's decision in *Branti v. Finkel*, 445 U.S. 507 (1980). As amply articulated by Judge Ripple in his dissenting opinions, the Seventh Circuit's approach "is simply a manifestation of its willingness to tolerate 'minor punishment' for the legitimate exercise of first amendment rights." *Rutan*, 868 F.2d at 959 (7th Cir. 1989) (en banc); 848 F.2d at 1412 (7th Cir. 1988).

A plethora of cases from this Court demonstrate the historical impropriety of the overt use of politics by governmental officials in everyday employment relations which do not involve senior policy makers. *E.g., West Va. Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein."); *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) ("constitutional protection does extend to the public servant whose exclusion... is patently arbitrary or discriminatory.") This Court has

emphatically underscored the historic broad sweep of constitutional protection for public employees. *E.g., Wieman, 344 U.S. at 192; Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Rankin v. McPherson*, 483 U.S. 378 (1987).

The constitutional right to support a particular political party or candidate is firmly rooted in the American tradition. *E.g., Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013, 1019-21 (1989); *Tashjian v. Republican Party of Connecticut*, 107 S.Ct. 544, 548 (1986); *Elrod v. Burns*, 427 U.S. 347 (1976). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). This Court has similarly recognized that the First Amendment affords protection for *not* supporting a particular political party or candidate. *E.g., Hudson v. Chicago Teachers Union*, 475 U.S. 292 (1986); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209, 222, 230, 235-36 (1977); *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir. 1987). This Court has firmly recognized the critical importance of safeguarding the constitutional rights of public employees and the severity of depriving citizens of the means of livelihood. *E.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543 (1985); ("We have frequently recognized the severity of depriving a person of the means of livelihood."); *Green v. McElroy*, 360 U.S. 474 (1960). The First Amendment prohibits the overt use of partisan politics in the day-to-day administration of non-policymaking applicants and personnel.

III. APPLICANTS FOR PUBLIC EMPLOYMENT ARE PROTECTED FROM POLITICAL COERCION AND PATRONAGE IN HIRING

The Seventh Circuit's decision in the case *sub judice* runs afoul of this Courts' reasoning in *Elrod* and *Perry v. Sindermann*, 408 U.S. 593 (1972). In *Perry*, this Court reasoned that government:

> may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially his interest in freedom of speech... We have applied the principles regardless of the public employees' contractual or other claim to a job. 408 U.S. at 597.

In *Elrod*, this Court observed:

> in *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), the Court recognized again that the government could not *deny* employment because of previous membership in a particular party. 427 U.S. at 358 (emphasis added).

The Court's emphasis in *Elrod* upon the *denial* of employment as opposed to dismissal indicates that the *Elrod* principle applies to hiring. The trilogy of *Cafeteria Workers*, *Perry* and *Elrod* underscores the meaningful application of the First Amendment to both applicants and employees, regardless of the particular status of the person. One simply does not lose First Amendment protection based on some lack of status; all persons are protected in their freedom of political belief and association. *Accord United States v. Robel*, 389 U.S. 258 (1967) (membership in the communist party may not bar a

person from employment in defense establishments important to national security).

In *Branti*, this Court's analysis also provides that the First Amendment protects individuals from political coercion in "either the selection or retention" of public employees. 445 U.S. at 519 n. 14. The specific use of the phrase "selection or retention" compels the conclusion that *Branti* contemplated First Amendment protection in hiring and selection, particularly since Justice Powell specifically indicated that one can construe *Branti* to include patronage hiring. *Branti*, 445 U.S at 522 n. 2 (Powell, J., dissenting). Justice Powell also suggested in *Elrod* that a First Amendment claim may be more significant when the issue involves patronage hiring rather than dismissals. *Elrod*, 427 U.S. at 381 n. 4 (Powell, J., dissenting).

In *Branti*, this Court focused upon the prohibition of political coercion in the *selection* process on three separate occasions in a single footnote. 445 U.S. at 519 n. 14. There, this Court raised the most interesting argument: "By what rationale can it even be suggested that it is legitimate to consider, in the selection process, the politics of one who is to represent indigent defendants accused of crime?" *Id.* Most recently, in *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987) and *Frazee v. Illinois Department of Employment Security*, 109 S.Ct. 1514 (1989), this Court reaffirmed the fundamental notion that an employment applicant enjoys First Amendment protection. *Accord Keyishian v. Bd. of Regents*, 385 U.S. 589, 609 (1967) (loyalty oath applicable to both applicants for employment and employees stricken). The Circuit Courts are in accord. *E.g., Rosenthal v. Rizzo*, 555 F.2d 390, 392 (3rd Cir. 1977), *cert. denied*, 434 U.S. 892 (1977) (hiring or discharge may not be conditioned in a manner infringing on an employee's or applicant's rights of political association); *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983) ("A potential employee of the state may not be required to forego his or her constitutionally protected rights simply to gain the benefits of state employment."); *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir.

1987) (same); *Lieberman v. Reisman*, 857 F.2d 896 (2nd Cir. 1988).

A plethora of federal courts and commentators have consistently recognized that the First Amendment protects hiring as well as discharge. *E.g.*, Comment, *Republicans Only Need Apply: Patronage Hiring and the First Amendment in Avery v. Jennings*, 71 Minn. L. Rev. 1374, 1378 n. 23 (1987) (collecting cases and articles); Comment, *First Amendment Limitations on Patronage Employment Practices*, 49 U. Chicago L. Rev. 181, 195 n. 94, 200-01 (1982) (same); *Cullen v. New York State Civil Service Commission*, 435 F. Supp. 546, 552 (E.D.N.Y. 1977), *appeal dismissed*, 566 F.2d 846 (2nd Cir. 1977) (denial of employment or promotion cannot be conditioned on making political contributions).

No First Amendment values inhere in the alleged distinction between discharge and failure to hire. The alleged distinction is merely a hyper-technical, formalistic distinction wholly unrelated to any principles of free speech or association. It is a distinction without substance. As this Court noted in *Elrod*, "[r]ights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." 427 U.S. at 359-60 n. 13.

IV. APPLICANTS FOR PUBLIC EMPLOYMENT ARE AFFORDED CONSTITUTIONAL PROTECTION FROM INVIDIOUS DISCRIMINATION

Numerous cases have recognized that failure to hire because of an impermissible reason contravenes the Fourteenth Amendment. *E.g., Hill v. Met. Atlanta Rapid Transit Auth.*, 841 F.2d 1533 (11th Cir. 1988) (failure to hire due to race); *Briggs v. Anderson*, 796 F.2d 1009 (8th Cir. 1986) (same); *Van Houdnos v. Evans*, 807 F.2d 648 (7th Cir. 1986) (failure to hire due to sex). *Cf. Brady v. Town of Colchester*, 863 F.2d 205 (2nd Cir. 1988) (substantive due process contravened by

denying building permit due to political animus); *Bello v. Walker*, 840 F.2d 1124, 1129 (3rd Cir. 1988) (same). In short, there are no legally significant distinctions between the constitutional rights of employees and job applicants. The First and Fourteenth Amendments prohibit invidious class based discrimination in all aspects of employment relations. There is simply no distinction justifying protection against discrimination by the Fourteenth Amendment while subverting the First Amendment interests to a substantially inferior position.

V. SUBSTANTIVE DUE PROCESS PRECLUDES THE DENIAL OF PUBLIC BENEFITS DUE TO POLITICAL ANIMUS

This Court has recently breathed new life into the doctrine of substantive due process. *E.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (the touchstone of due process is the "protection of the individual against arbitrary action of government..."); *see id.* at 337-38 (Stevens, J., concurring); *United States v. Salerno*, 107 S.Ct. 2095, 2101 (1987) (shocks the conscience approach); *Federal Deposit Ins. Corp. v. Mallen*, 108 S.Ct. 1780, 1787 (1988) (Due Process Clause prohibits arbitrary governmental interference with private sector employment relation). *See* McGuinness, *The New Substantive Due Process: Theory, Proof & Damages*, 24 New England L. Rev. (forthcoming February 1990; analyzing contemporary substantive due process in numerous contexts including public employment). Throughout our history, this Court has continued to proclaim that there is no place in our constitutional system for the arbitrary or abusive exercise of governmental power. *E.g., Bank of Columbia v. Okely*, 17 U.S. (4 Wheat) 235, 244 (1819); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("our institutions of government do not mean to leave room for the play and action of purely personal and arbitrary power..."); *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

The circuit courts have taken the lead from this Court and have applied substantive due process prohibiting the denial or interference with public benefits because of political factors. *E.g., Bello v. Walker*, 840 F.2d 1124, 1129 (3rd Cir. 1988) (interference with building permit process for partisan political reasons contravenes substantive due process); *Brady v. Colchester*, 863 F.2d 205, 216 (2nd Cir. 1988) (substantive due process precludes the denial of a building permit due to political animus).

These cases demonstrate that raw politics and patronage are impermissible considerations in governmental allocation of a variety of public benefits. Whether in land use, building permit disputes, licensing, or in public employment, partisan politics is inappropriate because it is wholly unrelated to the merits and without rational basis. Respondents' patronage scheme represents the most blatant form of arbitrary and capricious governmental action that is inherently repugnant to traditional American constitutional values.

CONCLUSION

For the foregoing reasons, Amicus Curiae NCPFFA respectfully requests that this Court reverse the decision of the Seventh Circuit and remand this case for trial.

Respectfully submitted,

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